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2  
3 UNITED STATES DISTRICT COURT  
4 EASTERN DISTRICT OF WASHINGTON

5 JORDAN PATRICK SCHWARTZ,  
6 Plaintiff,

7 v.

8 CAROLYN W. COLVIN,  
9 Commissioner of Social Security,  
10 Defendant.

No. CV-13-45-JTR

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

11 BEFORE THE COURT are cross-Motions for Summary Judgment. ECF  
12 No. 15, 19. Attorney David L. Lybbert represents Jordan P. Schwartz (Plaintiff);  
13 Special Assistant United States Attorney Gerald J. Hill represents the  
14 Commissioner of Social Security (Defendant). The parties have consented to  
15 proceed before a magistrate judge. ECF No. 6. After reviewing the administrative  
16 record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for  
17 Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

18 **JURISDICTION**

19 On August 27, 2009, Plaintiff filed an application for Social Security  
20 Supplemental Income, alleging disability beginning May 1, 2008. Tr. 20; 128.  
21 Plaintiff's claim was denied initially and on reconsideration, and he requested a  
22 hearing before an administrative law judge (ALJ). Tr. 20; 80-111. A hearing was  
23 held on October 18, 2011. Tr. 41. At the hearing, medical expert Ellen Rozenfeld,  
24 Ed.M., Psy.D., vocational expert Diane Kramer, and Plaintiff, who was represented  
25 by counsel, appeared and testified. Tr.41-79. ALJ Marie Palachuk presided. Tr.  
26 41. The ALJ denied benefits on November 23, 2011. Tr. 20-31. The Appeals  
27 Council denied review. Tr. 1-3. The instant matter is before this court pursuant to  
28 42 U.S.C. § 405(g).

**STATEMENT OF THE CASE**

The facts of the case are set forth in detail in the transcript of proceedings and are briefly summarized here. At the time of the hearing, Plaintiff was 24 years old, and living in his parents' home. Tr. 52; 67. He had attended four years of high school, but had not earned enough credits to graduate. Tr. 52-53. Subsequently, Plaintiff unsuccessfully attempted to earn a GED. Tr. 53.

Plaintiff has worked brief, part-time jobs at restaurants, a tire store, a cherry picking company, and at a Target store. Tr. 54-63. Recently, Plaintiff volunteered at the Humane Society and was ultimately offered a full-time position, but he declined because he was convinced his anxiety would prevent him from being able to sustain full-time work. Tr. 61-62. Plaintiff explained that when he worked as a volunteer, he was not anxious because he knew he could decline to do a task, and he knew he did not have to return the next day to work a full day. Tr. 62-63. He testified that while volunteering at the Humane Society, at times his anxiety symptoms required him to abruptly leave:

A lot of times it was when they needed help with doing bigger stuff, not just – because I would go there and maybe wash a dog, you know, feed them, clean out kennels and stuff like that – other stuff. And then they'd ask me to do other stuff, and I would come up with – at this point, now I can look back – dumb excuses to why I had to leave. And I would tell them, and they'd be, like, all right, well come back when you can. And I'd leave and maybe come back a couple days later.

Tr. 63.

Plaintiff said that when he works at a full-time job, he experiences anxiety every day. Tr. 54. He said during his last attempt at full-time work, every morning anxiety would "take over," he was unable to "think right," and he could not leave the house due to several fears. Tr. 55. Once at work, he constantly worried about making mistakes, so much that he was unable to remember the

1 procedures he was supposed to follow. Tr. 55-57. Plaintiff explained that when  
2 confronted with a new situation, such as meeting a new person, he typically  
3 experiences a panic attack. Tr. 66. He said his depression symptoms kept him  
4 from leaving his house, made him avoid interaction with people and neglect  
5 personal hygiene. Tr. 66-67.

## 6 STANDARD OF REVIEW

7 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the court set  
8 out the standard of review:

9 A district court's order upholding the Commissioner's denial of  
10 benefits is reviewed de novo. *Harman v. Apfel*, 211 F.3d 1172, 1174  
11 (9th Cir. 2000). The decision of the Commissioner may be reversed  
12 only if it is not supported by substantial evidence or if it is based on  
13 legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
14 Substantial evidence is defined as being more than a mere scintilla,  
15 but less than a preponderance. *Id.* at 1098. Put another way,  
16 substantial evidence is such relevant evidence as a reasonable mind  
17 might accept as adequate to support a conclusion. *Richardson v.*  
18 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to  
19 more than one rational interpretation, the court may not substitute its  
20 judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097;  
21 *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599  
22 (9th Cir. 1999).

23 The ALJ is responsible for determining credibility, resolving conflicts in  
24 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
25 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo,  
26 although deference is owed to a reasonable construction of the applicable statutes.  
27 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

28 It is the role of the trier of fact, not this court, to resolve conflicts in  
evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one  
rational interpretation, the court may not substitute its judgment for that of the  
Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579

(9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence exists to support the administrative findings, or if conflicting evidence exists that will support a finding of either disability or non-disability, the Commissioner's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

### SEQUENTIAL PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once a claimant establishes that a physical or mental impairment prevents him from engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show that (1) the claimant can make an adjustment to other work; and (2) specific jobs exist in the national economy which claimant can perform. *Batson v. Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004). If a claimant cannot make an adjustment to other work in the national economy, a finding of "disabled" is made. 20 C.F.R. §§ 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

### ADMINISTRATIVE DECISION

At step one, ALJ Palachuk found that Plaintiff had not engaged in substantial gainful activity since August 27, 2009. Tr. 22. At step two, she found Plaintiff had the severe impairments of attention deficit hyperactivity disorder, math learning disorder, adjustment disorder, and general anxiety disorder. Tr. 22.

1 At step three, the ALJ determined that Plaintiff does not have an impairment or  
2 combination of impairments that meets or medically equals one of the listed  
3 impairments in 20 C.F.R., Subpart P, Appendix 1 (20 C.F.R. §§ 404.1520(d),  
4 404.1525, 404.1526, 416.920(d), 416.925 and 416.926). Tr. 23. The ALJ  
5 determined that Plaintiff has the residual functional capacity (“RFC”) to perform a  
6 full range of work at all exertional levels. Tr. 25. However, the ALJ noted  
7 Plaintiff has additional mental limitations:

8 [C]laimant has the ability to perform simple, routine, and repetitive  
9 tasks involving up to three step commands. However, the claimant  
10 would be limited from none to minimal contact with the general  
11 public. The claimant would also be limited to only superficial contact  
12 with coworkers, and would essentially be isolated with only  
13 occasional supervision and should not be in close physical proximity  
14 to coworkers. The claimant would further require additional time to  
15 adapt to changes in the work setting or work routine, and would work  
16 best in a predictable/routine environment with little change. The  
claimant is also able to sustain attention and concentration for the 2  
hour intervals generally required between regularly scheduled breaks.

17 Tr. 25. At step four, the ALJ found that Plaintiff could perform past relevant work  
18 as animal attendant, cherry packer, and dishwasher/kitchen helper. Tr. 29.  
19 Additionally, the ALJ concluded that, based upon the vocational expert’s  
20 testimony, and notwithstanding Plaintiff’s limitations, and considering his age,  
21 education, work experience, and residual functional capacity, he is able to perform  
22 the representative occupations such as laundry worker II, industrial cleaner, and  
23 production assembler. Tr. 31. The ALJ concluded that Plaintiff was not disabled  
24 as defined by the Social Security Act. Tr. 31.

### 25 ISSUES

26 The question presented is whether substantial evidence exists to support the  
27 ALJ's decision denying benefits and, if so, whether that decision is based on proper  
28 legal standards. Plaintiff contends that the ALJ erred by (1) improperly rejecting

1 medical opinions; (2) determining Plaintiff had little credibility; (3) improperly  
2 rejecting lay witness testimony; (4) failing to conduct an adequate step four  
3 analysis; and (5) failing to identify specific jobs that Plaintiff could perform.  
4 ECF No. 15 at 12.

## 5 DISCUSSION

### 6 A. Medical Opinions

7 Plaintiff contends that the ALJ improperly weighed the opinions from both  
8 Dr. Rowe and Dr. Weick. ECF No. 15 at 14-19. The court agrees. In weighing  
9 medical source opinions in Social Security cases, the Ninth Circuit distinguishes  
10 among three types of physicians: (1) treating physicians, who actually treat the  
11 claimant; (2) examining physicians, who examine but do not treat the claimant; and  
12 (3) non-examining physicians, who neither treat nor examine the claimant. *Lester*  
13 *v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Generally, more weight should be  
14 given to the opinion of a treating physician than to the opinions of non-treating  
15 physicians. *Id.* Similarly, an examining physician's opinion generally must be  
16 given greater weight than that of a non-examining physician. *Lester*, 81 F.3d at  
17 830.

18 An ALJ must provide clear and convincing reasons for rejecting the  
19 uncontradicted opinion of an examining physician, and "specific and legitimate"  
20 reasons supported by substantial evidence in the record, for rejecting a contradicted  
21 opinion of an examining physician. *Lester*, 81 F.3d at 830-31. In other words, an  
22 ALJ may reject the opinion of an examining physician, if contradicted by a non-  
23 examining physician, by providing "specific and legitimate reasons that are  
24 supported by substantial evidence in the record." *Moore v. Comm'r of the Soc. Sec.*  
25 *Admin.*, 278 F.3d 920, 924 (9th Cir. 2002), citing *Lester*, 81 F.3d at 830-31.

#### 26 1. Thomas Rowe, Ph.D.

27 Dr. Rowe examined Plaintiff in September 2007, and again four years later  
28 in October 2011. Tr. 193-99; 346-58. During the 2011 testing, Plaintiff's MMPI-2



1 test results were of “questionable validity.” Tr. 352. Dr. Rowe stated that a  
2 significant probability existed that Plaintiff “endorsed items inaccurately by  
3 overreporting psychopathology.” Tr. 352. He explained that people with similar  
4 validity scores are possibly experiencing severe distress but lack either the  
5 interpersonal skills or the ability to alter their situation. Tr. 352.

6 Dr. Rowe also completed a 2011 Mental Medical Source Statement form,  
7 and he assessed Plaintiff with three marked limitations in the ability to: (1)  
8 maintain attention and concentration for extended periods; (2) complete a normal  
9 workday and work week without interruptions from psychologically based  
10 symptoms and to perform at a consistent pace without an unreasonable number and  
11 length of rest periods; and (3) interact appropriately with the general public. Tr.  
12 356. Dr. Rowe also assessed Plaintiff with nine moderate limitations, including his  
13 ability to make simple work-related decisions, ask simple questions or request  
14 assistance, and accept instructions and respond appropriately to criticism from  
15 supervisors. Tr. 356-57.

16 The ALJ’s analysis related to the weight given to Dr. Rowe’s 2011  
17 assessment consisted of a single sentence: “However, the undersigned gives little  
18 weight to Dr. Rowe’s opinion with regard to the second evaluation because his  
19 opinion is inconsistent with the objective evidence, Dr. Rozenfeld’s opinion, and  
20 the claimant’s self-reported activities, which indicate that the claimant does not  
21 have more than moderate limitations.” Tr. 28.

22 The ALJ’s reasons for rejecting Dr. Rowe’s opinion are neither “specific and  
23 legitimate,” nor supported by the record, and thus rejection of Dr. Rowe’s 2011  
24 evaluation was improper. See *Lester*, 81 F.3d at 830-31.

25 First, it is insufficient for an ALJ to reject the opinion of an examining  
26 physician by merely stating, without more, that the opinion is inconsistent with  
27 other evidence in the record. See *Embrey v. Bowen*, 849 F.2d 418, 421 (9th Cir.  
28 1988). Inconsistency between doctors’ opinions does not allow the ALJ to simply

1 select one opinion based solely on the fact that an inconsistency exists, but instead  
2 the ALJ must address, explain and resolve the conflicting evidence by assigning  
3 weight to differing opinions based on cogent, specific, and legitimate reasons.  
4 *Morgan*, 169 F.3d at 603; *Reddick v. Chater*, 157 F.3d 715, 722, 725 (9th Cir.  
5 1998). The ALJ failed to provide any analysis related to the “inconsistent”  
6 objective evidence.

7 Next, the ALJ improperly rejected Dr. Rowe’s opinion based upon  
8 contradictory opinions from a non-examining physician who testified at the  
9 hearing. “The contrary opinion of a non-examining medical expert does not alone  
10 constitute a specific, legitimate reason for rejecting a treating or examining  
11 physician's opinion.” *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001),  
12 citing *Magallanes v. Bowen*, 881 F.2d 747, 752 (9<sup>th</sup> Cir. 1989); *see also Pitzer v.*  
13 *Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 199) (“The nonexamining physicians’  
14 conclusion, with nothing more, does not constitute substantial evidence,  
15 particularly in view of the conflicting observations, opinions, and conclusions of an  
16 examining physician.”). In this case, the fact that Dr. Rowe’s opinion was  
17 contradicted by the testimony from Dr. Rozenfeld, a non-examining physician,  
18 does not constitute a specific and legitimate reason to reject Dr. Rowe’s opinion.  
19 In the absence of other valid reasons for rejecting Dr. Rowe’s opinion, the ALJ  
20 improperly rejected Dr. Rowe’s opinion based upon the opinions from Dr.  
21 Rozenfeld.

22 Finally, the ALJ rejected Dr. Rowe’s opinion of Plaintiff’s limitations  
23 because the limitations were contradicted by claimant’s self-reported activities.  
24 Daily activities inconsistent with a doctor's opinions of limitations are a valid  
25 reason to discount a physician's opinion. *Stubbs-Danielson v. Astrue*, 539 F.3d  
26 1169, 1175 (9th Cir. 2008). However, when providing reasons for rejecting  
27 opinion evidence, the ALJ should provide “a detailed and thorough summary of the  
28 facts and conflicting clinical evidence, stating his interpretation thereof, and



1 making findings.” *Reddick*, 157 F.3d at 725. The ALJ failed to identify Plaintiff’s  
2 activities that contradict Dr. Rowe’s assessment and, thus, the court is unable to  
3 find that Plaintiff’s daily activities constitute a specific and legitimate reason to  
4 reject Dr. Rowe’s opinion.

5 The ALJ failed to provide specific and legitimate reasons, supported by  
6 substantial evidence, for rejecting the opinion of Dr. Rowe. In the absence of valid  
7 reasons, the ALJ’s rejection of this opinion was error.

## 8 **2. Mark Weick, M.Ed.**

9 The record reveals Mark Weick, M.Ed., treated Plaintiff regularly beginning  
10 in September 2009. Tr. 259-343. Mr. Weick wrote a letter dated August 8, 2011,  
11 indicating that Plaintiff had “made significant progress,” but he continues to be, at  
12 times, “severely impaired by anxiety and depression (including suicidal ideation  
13 and despair), and [he] has difficulties in social relationships and communication.”  
14 Tr. 344. Mr. Weick recommended Plaintiff “be approved for disability at this time,  
15 pending hoped for outcomes of employability, amelioration of paralyzing anxiety  
16 and depression, and effective social skills.” Tr. 344.

17 The ALJ gave little weight to Dr. Weick’s opinion for three reasons: (1)  
18 because he “did not provide any actual limitations or basis for his opinion, which  
19 was only a conclusion of disability”; (2) his conclusion was inconsistent with his  
20 own chart notes that indicated instances of Plaintiff reporting he was “doing well”  
21 and his “functioning improved”; and (3) because “determinations of disability are  
22 reserved to the Commissioner, and not treating sources.” Tr. 28.

23 The ALJ’s first reason for rejecting Mr. Weick’s opinion is contradicted by  
24 the August 8, 2011, letter. Tr. 344. Contrary to the ALJ’s assertion, the basis for  
25 Mr. Weick’s opinion is provided within the letter and the accompanying treatment  
26 notes. The letter identifies Plaintiff’s diagnoses (i.e., “paralyzing anxiety and  
27 depression”), describes how his impairments manifest in symptoms (“difficulties in  
28 social relationships and communication”; “suicidal ideation and despair”) and

1 indicates Mr. Weick's opinion that Plaintiff cannot sustain employment. Tr. 344.  
2 The ALJ's assertion that the letter was merely a conclusion ignores the content of  
3 the letter, as well as the accompanying treatment notes and, thus, does not  
4 constitute a "specific and legitimate" reason to reject the opinion.

5 Next, the ALJ reasons that Mr. Weick's opinion is entitled to little weight  
6 because his chart notes indicate instances where Plaintiff is "doing well," and his  
7 functioning improved. Tr. 28. When analyzing mental impairments, an ALJ must  
8 read individual chart notes "in context of the overall diagnostic picture." *Holohan*  
9 *v. Massanari*, 246 F.3d 1195, 1205 (9<sup>th</sup> Cir. 2001). "[The fact that] a person who  
10 suffers from . . . anxiety[] and depression makes some improvement does not mean  
11 that the person's impairments no longer seriously affect her ability to function in a  
12 workplace." *Id.* Moreover, "[a] single current examination may not always  
13 properly describe an individual's sustained ability to function. It should be viewed  
14 as one point in time in the longitudinal picture of an individual impairment."  
15 *DeLorme v. Sullivan*, 924 F.2d 841, 851 (9th Cir. 1991), quoting SSR 83-15.

16 Also, in evaluating whether the claimant satisfies the disability criteria, the  
17 ALJ must evaluate the claimant's "ability to work on a sustained basis." 20 C.F.R. §  
18 404.1512(a) . "Occasional symptom-free periods – and even the sporadic ability to  
19 work – are not inconsistent with disability." *Lester*, 81 F.3d at 833. That a person  
20 who suffers from severe panic attacks, anxiety, and depression "makes some  
21 improvement does not mean that the person's impairments no longer seriously  
22 affect her ability to function in a workplace." *Holohan*, 246 F.3d at 1205, citing  
23 *Kellough v. Heckler*, 785 F.2d 1147, 1153 (4th Cir. 1986) ("'Feels well' and 'normal  
24 activity' must be read in context). The ALJ's reliance upon isolated instances when  
25 the Plaintiff indicated some improvement in functioning is misplaced. Considered  
26 as a whole, the medical records indicate Plaintiff's anxiety and depression  
27 symptoms wax and wane, and the record does not support the ALJ's conclusion  
28 that Dr. Weick's opinion is contradicted by his treatment records.

1 Finally, the ALJ rejected Mr. Weick's opinion because the "determinations  
2 of disability are reserved to the Commissioner, and not treating sources." Tr. 28.  
3 In disability benefits cases, medical providers may render medical, clinical  
4 opinions, or they may render opinions on the ultimate issue of disability - the  
5 claimant's ability to perform work. *Reddick*, 157 F.3d at 725. While an ALJ is not  
6 bound by the uncontroverted opinions of the claimant's medical providers on the  
7 ultimate issue of disability, the ALJ cannot reject the opinions without providing  
8 clear and convincing reasons. *Matthews v. Shalala*, 10 F.3d 678, 680 (9th Cir.  
9 1993). As a result, the ALJ may not reject Mr. Weick's opinion simply because the  
10 determination of disability belongs to the ALJ. In sum, none of the ALJ's reasons  
11 for rejecting Mr. Weick's opinion is "specific and legitimate," and supported by  
12 substantial evidence, and thus the ALJ's dismissal of this opinion was error.

### 13 **B. Credibility**

14 The ALJ found Plaintiff was not credible. Tr. 26. Plaintiff contends that the  
15 ALJ erred by failing to identify the testimony that was not credible, and by failing  
16 to identify the evidence that undermined the testimony. ECF No. 15 at 19.

17 The ALJ is responsible for determining credibility. *Andrews*, 53 F.3d at  
18 1039. Unless affirmative evidence exists indicating that the claimant is  
19 malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear  
20 and convincing." *Lester*, 81 F.3d at 834. The ALJ's findings must be supported  
21 by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.  
22 1990). "General findings are insufficient; rather, the ALJ must identify what  
23 testimony is not credible and what evidence undermines the claimant's  
24 complaints." *Reddick*, 157 F.3d at 722, quoting *Lester*, 81 F.3d at 834. If objective  
25 medical evidence exists of an underlying impairment, the ALJ may not discredit a  
26 claimant's testimony as to the severity of symptoms merely because they are  
27 unsupported by objective medical evidence. *See Bunnell v. Sullivan*, 947 F.2d 341,  
28 347-48 (9th Cir. 1991).

1 To determine whether the claimant's testimony regarding the severity of the  
2 symptoms is credible, the ALJ may consider ordinary techniques of credibility  
3 evaluation, such as (1) the claimant's reputation for lying, prior inconsistent  
4 statements concerning the symptoms, and other testimony by the claimant that  
5 appears less than candid; (2) unexplained or inadequately explained failure to seek  
6 treatment or to follow a prescribed course of treatment; and (3) the claimant's daily  
7 activities. *See, e.g., Fair v. Bowen*, 885 F.2d 597, 602-04 (9th Cir. 1989); *Bunnell*,  
8 947 F.2d at 346-47.

9 The reasons cited by the ALJ included Mr. Weick's chart notes indicating an  
10 instance of improved functioning, a particular day he reported he was "doing  
11 well," and one day he stated that his job "was going well." Tr. 26. Also, the ALJ  
12 cited one record where Plaintiff apparently told Mr. Weick that he believed he did  
13 not apply himself. Tr. 26; 263.

14 As stated above, in analyzing mental impairments, the ALJ must read chart  
15 notes in context. *Holohan* 246 F.3d at 1205. For the reasons stated above, the  
16 ALJ's reliance upon isolated improvements in functioning is misplaced. Plaintiff's  
17 experience of episodic improvement in his depression symptoms does not diminish  
18 his credibility, but instead reflects the nature of mental impairments. *See, e.g.,*  
19 *Taylor v. Comm'r of Soc. Sec.*, 659 F.3d 1228, 1234 (9th Cir. 2011) (ALJ erred in  
20 holding instances where bi-polar claimant was able to function, when his alleged  
21 disability involves attacks that wax and wane).

22 The ALJ also found significance in the fact that Plaintiff has volunteered for  
23 the Humane Society for approximately one year, and was offered a job. Tr. 26.  
24 The ALJ heavily relied upon the fact that Plaintiff has been offered and even  
25 accepted other jobs as "evidence" that establishes Plaintiff's "anxiety symptoms  
26 are not as severe as alleged and that the claimant can retain and maintain  
27 employment, especially when considering that the claimant worked for  
28 approximately one year at the Humane Society ...." Tr. 26-27.

1 The ALJ reasoned that because Plaintiff can perform sporadic volunteer  
2 work for a few hours at a time, therefore Plaintiff can sustain full time work. This  
3 reasoning is flawed. Social Security regulations define residual functional capacity  
4 as the "maximum degree to which the individual retains the capacity for sustained  
5 performance of the physical-mental requirements of jobs." 20 C.F.R. 404, Subpt.  
6 P, App. 2 § 200.00(c). In evaluating whether a claimant satisfies the disability  
7 criteria, the Commissioner must evaluate the claimant's "ability to work on a  
8 sustained basis." 20 C.F.R. § 404.1512(a); *Reddick*, 157 F.3d at 724. The  
9 regulations further specify: "When we assess your physical abilities, we first assess  
10 the nature and extent of your physical limitations and then determine your residual  
11 functional capacity for work activity on a regular and continuing basis." *Id.* at §  
12 404.1545(b). The Ninth circuit has noted that "occasional symptom-free periods -  
13 and even the sporadic ability to work-are not inconsistent with disability." *Lester*,  
14 81 F.3d at 833.

15 The ALJ's flawed assumption that permeates the decision is: Because  
16 Plaintiff can sustain sporadic volunteer work – work that allows him to choose the  
17 date and hours and allows him to change his mind about whether he can stay at  
18 work or perform particular tasks – Plaintiff therefore can sustain the demands of  
19 regular, full-time employment. The ALJ's assumption, and its inherent flaw, is  
20 illustrated in the ALJ's questioning of Plaintiff:

21 ALJ: Mr. Schwartz, I also noted that you had been offered a  
22 job at the Humane Society and you turned it down. Yet you continued  
23 to volunteer there for a number of months. Why did you turn it  
24 down?

25 CLMT: Oh. Once again, my anxiety would kick in. And  
26 basically, my mind is telling me that – it's telling me all the bad things  
27 you're going to do there. You're going to get fired. You're going to  
28 do this. And I told them that I couldn't take the job because of those  
things. You know, I just – just my anxiety kicked in so much that I  
turned down the job. But I –

1 ALJ: Yet, you were volunteering there for months. *It's the*  
2 *same thing. You just weren't getting paid.*

3 CLMT: Yeah, see, that's the thing is I never felt the anxiety  
4 kick in when I was just a volunteer. Maybe it's because, maybe, I  
5 knew I could leave whenever I wanted, and I could show up whatever  
6 [sic] I wanted. But, you know, we [sic] me working there, I had to be  
7 there at a certain time. And I had to work all day, and then leave at a  
8 certain time and then be back the next day. Volunteering wasn't like  
9 that, and that's what I liked about it.

10 Tr. 61-62 (emphasis added).

11 The record contradicts the ALJ's assumption that sporadic volunteering  
12 requires the same capabilities as full-time, regular, paid work. Plaintiff's volunteer  
13 workday and workweek is dramatically different from a regular job that requires  
14 all-day attendance despite panic attacks or "paralyzing anxiety." While  
15 volunteering allows Plaintiff to simply leave when he has an attack, full-time  
16 regular employment would eliminate that flexible schedule. Under these  
17 circumstances, the ALJ's reliance upon Plaintiff's ability to volunteer part-time is  
18 not a persuasive reason for finding Plaintiff lacked credibility.

19 Both reasons supporting the ALJ's credibility analysis failed to meet the  
20 "clear and convincing" test, and thus the ALJ erred by concluding Plaintiff lacked  
21 credibility.

### 22 **C. Lay Witness**

23 Plaintiff contends that the ALJ erred by rejecting the testimony from his  
24 father about his inability to sustain employment. ECF No. 15 at 21-22. The ALJ  
25 must consider statements of "non-medical sources" including spouses, parents, and  
26 other relatives in determining the severity of a claimant's symptoms. 20 C.F.R. §  
27 404.1513(d)(4); *see also Stout v. Comm'r*, 454 F.3d 1050, 1053 (9th Cir. 2006) ("In  
28 determining whether a claimant is disabled, an ALJ must consider lay witness  
testimony concerning a claimant's ability to do work."). As a general rule, "lay



1 witness testimony as to a claimant's symptoms or how an impairment affects ability  
2 to work is competent evidence, and therefore cannot be disregarded without  
3 comment." *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) (emphasis and  
4 internal citations omitted). To discount the testimony of a lay witness, the ALJ  
5 must give specific, germane reasons for rejecting the opinion of the witness.  
6 *Dodrill v. Shalala*, 12 F.3d 915, 919 (9<sup>th</sup> Cir. 1999).

7 Plaintiff's father, Robert Schwartz, testified that Plaintiff has worked with  
8 the Department of Social and Health Services for people with disabilities in order  
9 to get help in trying to find work. Tr. 69. Mr. Schwartz described how Plaintiff  
10 struggled with the process to learn job interview skills, and how the program  
11 director was concerned that Plaintiff would not be able to find employment due to  
12 his anxiety and panic. Tr. 69. Mr. Schwartz also described Plaintiff's debilitating  
13 panic attacks and related how Plaintiff's panicked behavior when he is employed.  
14 Tr. 70-71.

15 In this case, the ALJ rejected testimony from Plaintiff's father based upon  
16 the flawed assumption that Plaintiff simply refused to work full time:

17 The undersigned gives little weight to Mr. Schwartz's testimony  
18 because the evidence shows that the claimant has been able to retain  
19 employment, but has declined said employment. The evidence also  
20 shows that the claimant does have the mental ability and capacity to  
21 maintain employment, evidenced by the fact that the claimant worked  
as a volunteer at the Humane Society for approximately one year.

22 Tr. 29.

23 For the reasons explained above, the ALJ's sole reason for rejecting Mr.  
24 Schwartz's testimony is not a valid, germane reason. As such, the ALJ improperly  
25 rejected the lay testimony.<sup>1</sup>

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27 <sup>1</sup>Plaintiff raised two remaining issues, but in light of this disposition, the  
28 court need not address those issues.

## CONCLUSION

Having reviewed the record and the ALJ's findings, the court concludes the ALJ's decision is based on legal error, and requires remand. On remand, the ALJ is directed to reevaluate the opinions from Dr. Rowe and Mr. Weick, and, if necessary, provide legally sufficient reasons for rejecting these opinions and identify with particularity the evidence supporting the reasons, as well as supply legally sufficient reasons supporting the weight accorded to the other medical source opinions. Additionally, on remand the ALJ will reconsider Plaintiff's credibility, and provide valid reasons supported by substantial evidence in determining credibility. Finally, on remand the ALJ will reconsider the lay testimony and provide valid reasons for the weight accorded to that evidence. The decision is, therefore, **REVERSED** and the case is **REMANDED** for further proceedings consistent with this opinion. Accordingly,

### IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is **GRANTED**.

2. Defendant's Motion for Summary Judgment, **ECF No. 19**, is **DENIED**.

3. An application for attorney fees may be filed by separate motion. The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff, and the file shall be CLOSED.

DATED December 31, 2013.



A handwritten signature in black ink, appearing to be "M" or "Rodgers", written over a horizontal line.

JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE